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SAMUEL KWESI DADJO

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

SAMUEL KWESI DADJO,

Plaintiff,

v.

ENCORE RECEIVABLE MANAGEMENT,
INC., a Kansas corporation,

Defendant.

Case No. C07-05856-SC

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

Date: September 19, 2008
Time: 10:00 a.m.
Judge: Honorable Samuel Conti
Courtroom: 1, 17th Floor
Place: 450 Golden Gate Ave
San Francisco, California

COMES NOW the Plaintiff, SAMUEL KWESI DADJO, by and through his attorney Fred W. Schwinn of the Consumer Law Center, Inc., and hereby submits his Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment filed herein.

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I. INTRODUCTION

This case was brought by SAMUEL KWESI DADJO (hereinafter “Plaintiff”) against a debt collection agency, ENCORE RECEIVABLE MANAGEMENT, INC., (hereinafter “Defendant”). Plaintiff alleges various violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* (hereinafter “FDCPA”), and the Rosenthal Fair Debt Collection Practices Act, Cal. Civil Code § 1788, *et seq.* (hereinafter “RFDCPA”), which prohibit debt collectors from engaging in abusive, deceptive and unfair practices. Plaintiff seeks statutory damages, attorney fees and costs under the FDCPA and RFDCPA.

This case arises out of several answering machine messages that Defendant recorded on Plaintiff’s answering machine. The debt being collected was used for personal, family or household purposes. Plaintiff alleges that Defendant caused Plaintiff’s telephone to ring repeatedly and continuously with the intent to annoy, abuse or harass Plaintiff. Plaintiff alleges that Defendant caused Plaintiff’s telephone to ring with such frequency as to be unreasonable and constitute harassment to Plaintiff under the circumstances. Plaintiff alleges that Defendant failed to disclose its identity and the nature of its business. Plaintiff also alleges that Defendant failed to disclose that the communications were from a debt collector.

Plaintiff hereby moves for partial summary judgment on his claims for violation of 15 U.S.C. §§ 1692d(6) and 1692e(11), and Cal. Civil Code §§ 1788.11(b) and 1788.17. Plaintiff reserves his claims under 15 U.S.C. § 1692d(5) and Cal. Civil Code §§ 1788.11(d) for later determination by the jury, should the Court award less than the maximum in statutory damages and statutory penalties.

II. PROCEDURAL HISTORY

On November 19, 2007, Plaintiff filed his Complaint in this action against Defendant.¹ Thereafter, Defendant filed its Answer on January 15, 2008.² On February 20, 2008, Plaintiff

¹ Doc. 1.

² Doc. 3.

propounded Requests for Admission³ and Requests for Production of Documents⁴ on Defendant, Encore Receivable Management, Inc. On April 3, 2008, Defendant served its responses to Plaintiff's Requests for Admission⁵ and Request for Production of Documents.⁶

On August 15, 2008, Plaintiff's Motion for Partial Summary Judgment was filed herein. This Memorandum of Points and Authorities is submitted in support thereof.

III. FACTS OF THE CASE

Plaintiff, SAMUEL KWESI DADJO, is a "consumer" within the meaning of 15 U.S.C. § 1692a(3),⁷ and a "debtor" within the meaning of Cal. Civil Code § 1788.2(h).⁸ Defendant, ENCORE RECEIVABLE MANAGEMENT, INC., is a Kansas corporation engaged in the business of collecting consumer debts.⁹

On a date or dates unknown to Plaintiff, Plaintiff incurred a financial obligation for personal, family or household purposes, which is therefore a "debt" as that term is defined by 15 U.S.C. § 1692a(5),¹⁰ and Cal. Civil Code § 1788.2(f).¹¹ Sometime thereafter, the debt was sold, assigned or otherwise transferred to Defendant for collection from Plaintiff.¹²

Between the dates April 10, 2007, and April 30, 2007, Defendant recorded several automated

³ Doc. 13; Declaration of Fred Schwinn in Support of Motion for Partial Summary Judgment ¶ 3 (hereinafter "Schwinn Declaration") and Exhibit "1."

⁴ Doc. 13; Schwinn Declaration ¶ 5 and Exhibit "3."

⁵ Schwinn Declaration ¶ 4 and Exhibit "2."

⁶ Schwinn Declaration ¶ 6 and Exhibit "4."

⁷ Complaint (Doc. 1) ¶¶ 6 and 22; Declaration of Samuel Kwesi Dadjo in Support of Motion for Summary Judgment (hereinafter "Dadjo Declaration") ¶¶ 3 and 4.

⁸ Complaint (Doc. 1) ¶¶ 6 and 39; Dadjo Declaration ¶¶ 3 and 4.

⁹ Complaint (Doc. 1) ¶ 7; Schwinn Declaration, Exhibit "2" Nos. 3, 4, and 5.

¹⁰ Dadjo Declaration ¶ 4.

¹¹ Dadjo Declaration ¶ 4.

¹² Schwinn Declaration Exhibit "4" No. 24 and E000001 - E000026.

1 messages on Plaintiff's answering machine.¹³ On April 11, 12, 13, 14, 17, 18, 19, and 30, 2007,
2 Defendant recorded the following automated message on Plaintiff's answering machine.

3 "Please contact Mr. Roche at 866-802-6985 regarding an important personal
4 business matter. Again, this is Mr. Roche at 866-802-6985. I look forward to
hearing from you."¹⁴

5 In addition to these answering machine messages, Defendant recorded several other
6 messages on Plaintiff's answering machine, as described below.

7 On April 10, 2007, Defendant recorded an automated message on Plaintiff's answering
8 machine which stated, "Please press 1 now. If this is not Sam Dadjo, please press 2 now. We have
9 a very important call for Sam. This is not a telemarketing call."¹⁵

10 On April 11, 2007, Defendant recorded the following automated message on Plaintiff's
11 answering machine. "We have a very important call for Sam. This is."¹⁶

12 On April 17, 2007, Defendant recorded the following automated message on Plaintiff's
13 answering machine.

14 "a sales or marketing phone call. Please press the 9 key now to retrieve your
15 important message or call us back at 1-866-802-6985. Thank you. Hello. This is
16 an important message for Sam K. Dadjo. This is not a sales or marketing phone call.
Please press the 9 key now to retrieve your important message or call us back at 1-
866-802-6985. Thank you."¹⁷

17 On April 18, 2007, Defendant recorded the following automated message on Plaintiff's
18 answering machine. "This is not a sales or marketing phone call. Please press the 9 key now to
19 retrieve your important message or call us back at 866-802-69."¹⁸

20 On April 19, 2007, Defendant recorded the following automated message on Plaintiff's
21

22 ¹³ Dadjo Declaration ¶¶ 5-18.

23 ¹⁴ Dadjo Declaration ¶¶ 8, 9, 10, 11, 12, 15, 16, and 18.

24 ¹⁵ Dadjo Declaration ¶ 6.

25 ¹⁶ Dadjo Declaration ¶ 7.

26 ¹⁷ Dadjo Declaration ¶ 13.

27 ¹⁸ Dadjo Declaration ¶ 14.

1 answering machine.

2 “... sales or marketing phone call. To retrieve this important message, press the 5
3 key now or call us back 1-866-802-6985. That number again, is 1-866-802-6985.
Thank you. Hello.”¹⁹

4 IV. STANDARD OF REVIEW

5 The standard of review for a motion for summary judgment is that the moving party is
6 entitled to summary judgment when the evidence shows that there is no genuine issue of material
7 fact, and that the moving party is entitled to judgment as a matter of law.²⁰ The Court must
8 determine “whether there is the need for a trial—whether, in other words, there are any genuine
9 factual issues that properly can be resolved only by a finder of fact because they may reasonably be
10 resolved in favor of either party.”²¹ “Only disputes over facts that might affect the outcome of the
11 suit under governing law will . . . preclude summary judgment.”²² When the record taken as a whole
12 would not persuade a rational trier of fact to find for the nonmoving party, there is no genuine issue
13 for trial.²³ In some cases, the evidence of the opposing party is so weak as to “fail[] to raise a
14 material issue of fact.”²⁴

15 The movant must carry this burden of “identifying those parts of the record that indicate the
16 absence of a genuine issue of material fact.”²⁵ Once this burden is met, the non-movant is required
17 to “come forward with specific facts showing that there is a genuine issue for trial” as to elements
18

19 ¹⁹ Dadjo Declaration ¶ 17.

20 ²⁰ Fed. R. Civ. P. 56(c); *Stockton Wire Products, Inc. v. K-Lath Corp.*, 440 F.2d 782 (9th Cir.
21 1971).

22 ²¹ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2510, 91 L. Ed. 2d
23 202, 212 (1986).

24 ²² *Id.* at 248.

25 ²³ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348,
26 1356, 89 L. Ed. 2d 538 (1986).

27 ²⁴ *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 906 (9th Cir. 1994).

28 ²⁵ *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1048 (9th Cir. 1995).

essential to the non-movant's claim.²⁶ The non-movant must show more than "some metaphysical doubt as to the material facts;"²⁷ it must "set forth specific facts showing that there is a genuine issue for trial."²⁸

The Court must resolve all disputed facts and weigh all evidence "in the light most favorable to the nonmoving party."²⁹ However, the nonmoving party may not rely upon mere allegations or denials contained in its pleadings or briefs, but must come forward with specific facts showing the presence of a genuine issue for trial.³⁰ As noted above, the requirement that a "genuine" issue of fact must be present has been interpreted to mean that the evidence is such that a reasonable trier of fact could return a verdict for the nonmoving party.³¹ Summary judgment is more than a "disfavored procedural shortcut," it is an important procedure "designed to 'secure the just, speedy and inexpensive determination of every action.' Fed. R. Civ. P. 1."³² One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose.³³

V. SUMMARY OF ARGUMENT

- A. The "Least Sophisticated Consumer" Standard Is Used to Analyze Violations of the FDCA.
- B. Under the Strict Liability Standard of the FDCA, Plaintiff Has Shown Numerous Violations of the Act, as Seen from the Perspective of the "Least Sophisticated Consumer."

²⁶ *Schneider v. TRW, Inc.*, 938 F.3d 986, 991 (9th Cir. 1990).

²⁷ *Matsushita Elec. Indus. Co.*, 475 U.S. at 586

²⁸ Fed. R. Civ. P. 56(e).

²⁹ *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987).

³⁰ *Rieber v. Kovelman (In re Kovelman)*, 1995 U.S. App. LEXIS 8487 at *2 (9th Cir. April 6, 1995).

³¹ *Anderson*, 477 U.S. at 248

³² *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

³³ *Id.*, at 323-324.

- 1 C. Defendant Failed to Disclose Defendant's Identity and the Nature of Defendant's Business,
- 2 in Violation of 15 U.S.C. § 1692d(6).
- 3 D. Defendant Failed to Disclose That the Communications Were from a Debt Collector, in
- 4 Violation of 15 U.S.C. § 1692e(11).
- 5 E. Defendant Has Violated the RFDCPA.
- 6 F. Defendant Has Violated Cal. Civil Code § 1788.17.
- 7 G. Defendant Has Violated Cal. Civil Code § 1788.11(b).
- 8 H. This Court Should Award Plaintiff the Maximum Statutory Damage Amount of \$1,000 under
- 9 the FDCPA.
- 10 I. Plaintiff Should Be Awarded \$1,000 under Cal. Civil Code § 1788.30(b).
- 11 J. Plaintiff Should Be Awarded \$1,000 under Cal. Civil Code § 1788.17.
- 12 K. Both Congress and the California Legislature Have Expressed Their Intent That the
- 13 Remedies for Violations of the FDCPA and RFDCPA Be Cumulative.
- 14 L. Plaintiff Has a Statutory Right to Attorney's Fees and Costs.

VI. STATEMENT OF QUESTIONS PRESENTED

16 Has Defendant violated the Fair Debt Collection Practices Act and the Rosenthal Fair Debt
 17 Collection Practices Act? If so, what is the amount of statutory damages that should be awarded to
 18 Plaintiff?

VII. ARGUMENT

A. THE "LEAST SOPHISTICATED CONSUMER" STANDARD IS USED TO ANALYZE VIOLATIONS OF THE FDCPA

22 The FDCPA states that its purpose, in part, is "to eliminate abusive debt collection practices
 23 by debt collectors."³⁴ The statute is designed to protect consumers from unscrupulous collectors,
 24 whether or not there is a valid debt.³⁵ The FDCPA broadly prohibits unfair or unconscionable
 25 collection methods; conduct which harasses, oppresses or abuses any debtor; and any false,

³⁴ 15 U.S.C. § 1692(e).

³⁵ *Baker v. G.C. Services*, 677 F.2d 775, 777 (9th Cir. 1982).

1 deceptive or misleading statements, in connection with the collection of a debt.³⁶ The FDCPA also
 2 requires the debt collector to provide the consumer with a notice of his or her validation rights.³⁷

3 The United States Court of Appeals for the Ninth Circuit has held that whether a
 4 communication or other conduct violates the FDCPA is to be determined by analyzing it from the
 5 perspective of the “least sophisticated consumer.”³⁸ The “least sophisticated consumer” standard
 6 is objective—not subjective.³⁹ Courts determine whether the “least sophisticated consumer” would
 7 be misled or deceived by the statements made in a collection letter as a matter of law.⁴⁰

8 “The basic purpose of the least sophisticated consumer standard is to ensure that the FDCPA
 9 protects all consumers, the gullible as well as the shrewd.”⁴¹ “While protecting naive consumers,
 10 the standard also prevents liability for bizarre or idiosyncratic interpretations of collection notices
 11 by preserving a quotient of reasonableness and presuming a basic level of understanding and
 12 willingness to read with care.”⁴²

13 “As the FDCPA is a strict liability statute, proof of one violation is sufficient to support
 14 summary judgment for the plaintiff.”⁴³ “Because the Act imposes strict liability, a consumer need

16 ³⁶ 15 U.S.C. §§ 1692d, 1692e, and 1692f.

17 ³⁷ 15 U.S.C. § 1692g.

18 ³⁸ *Swanson v. Southern Oregon Credit Serv.*, 869 F.2d 1222, 1225 (9th Cir. 1988); *Wade v.*
 19 *Regional Credit Ass’n*, 87 F.3d 1098, 1100 (9th Cir. 1996).

20 ³⁹ *Swanson*, 869 F.2d at 1227.

21 ⁴⁰ *Wade*, 87 F.3d at 1100; *Terran v. Kaplan*, 109 F.3d 1428, 1432 (9th Cir. 1977); *Swanson*,
 22 896 F.2d at 1225-26.

23 ⁴¹ *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2nd Cir. 1993).

24 ⁴² *U.S. v. Nat’l Fin. Servs.*, 98 F.3d 131, 136 (4th Cir. 1996) (citations omitted); *see also*
 25 *Russell v. Equifax A.R.S.*, 74 F.3d 30 (2nd Cir. 1996); *Bentley v. Great Lakes Collection Bureau*, 6
 26 F.3d 60 (2nd Cir. 1993); *Jeter v. Credit Bureau*, 760 F.2d 1168 (11th Cir. 1985); *Graziano v.*
Harrison, 950 F.2d 107, 111 (3rd Cir. 1991); *Avila v. Rubin*, 84 F.3d 222, 226-27 (7th Cir. 1996)
 (“the standard is low, close to the bottom of the sophistication meter”).

27 ⁴³ *Cacace v. Lucas*, 775 F. Supp. 502, 505 (D. Conn. 1990); *see also Stojanovski v. Strobl*
 28 *& Manoogian, P.C.*, 783 F. Supp. 319, 323 (E.D. Mich. 1992); *Riveria v. MAB Collections*, 682 F.

not show intentional conduct by the debt collector to be entitled to damages.”⁴⁴ Furthermore, the question of whether the consumer owes the alleged debt has no bearing on a suit brought pursuant to the FDCPA.⁴⁵

It is important to note that by protecting consumers from abusive, deceptive and unfair collection practices, the FDCPA insures that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged.⁴⁶ Moreover, the FDCPA further insures that regardless of whether a consumer owes a debt, he or she will be treated in a reasonable and civil manner.⁴⁷

Accordingly, Plaintiff asserts that whether or not Defendant violated the FDCPA must be evaluated from the standpoint of the “least sophisticated consumer.”

B. UNDER THE STRICT LIABILITY STANDARD OF THE FDCPA, PLAINTIFF HAS PLED NUMEROUS VIOLATIONS OF THE ACT, AS SEEN FROM THE PERSPECTIVE OF THE “LEAST SOPHISTICATED CONSUMER”

To establish a violation of the FDCPA, one need only show that: (1) Plaintiff is a consumer, (2) Plaintiff has been the object of collection activity arising from a consumer debt, (3) Defendant collecting the “debt” is a “debt collector” as defined in the Act, and (4) Defendant has engaged in any act or omission in violation of the prohibitions or requirements of the Act.⁴⁸ Plaintiff has pled and Defendant has admitted that Defendant is a debt collector. Further, Plaintiff is able to show that he is a consumer and the debt which Defendant was attempting to collect is a consumer debt. The

Supp. 174, 178-9 (W.D.N.Y. 1988).

⁴⁴ *Russell*, 74 F.3d at 33; *see also Taylor v. Perrin Landry, deLaunay & Durand*, 103 F.3d 1232, 1236 (5th Cir. 1997); *Bentley*, 6 F.3d at 62; *Clomon*, 988 F.2d at 1318.

⁴⁵ *McCartney v. First City Bank*, 970 F.2d 45 (5th Cir. 1992); *Baker*, 677 F.2d at 777.

⁴⁶ 15 U.S.C. § 1692(e).

⁴⁷ *Baker*, 677 F.2d at 777.

⁴⁸ *Turner v. Cook*, 362 F.3d 1219, 1227-1228 (9th Cir. 2004); *Romine v. Diversified Collection Servs.*, 155 F.3d 1142, 1145 (9th Cir. 1998); *De Coito v. Unifund Corp.*, 2004 U.S. Dist. LEXIS 23729 at *8 (D. Haw. January 4, 2004); *United States v. Trans Continental Affiliates*, 1997 U.S. Dist. LEXIS 388 at *8 (N.D. Cal. January 8, 1997).

1 remainder of this memorandum will show that the last element is also satisfied as a matter of law.

2 Because the FDCPA is a strict liability statute, proof of one violation is sufficient to defeat
3 a motion to dismiss and support summary judgment for a Plaintiff.⁴⁹ In light of this strict liability
4 standard, a consumer need not show intentional conduct by the debt collector in order to be entitled
5 to damages,⁵⁰ and there are no unimportant violations.⁵¹ Further, no proof of deception or actual
6 damages is required to obtain statutory remedies.⁵²

7 **1. DEFENDANT FAILED TO DISCLOSE DEFENDANT'S IDENTITY**
8 **AND THE NATURE OF DEFENDANT'S BUSINESS, IN VIOLATION**
9 **OF 15 U.S.C. § 1692d(6).**

10 15 U.S.C. § 1692d(6) provides:

11 A debt collector may not engage in any conduct the natural consequence of which
12 is to harass, oppress, or abuse any person in connection with the collection of a debt.
13 Without limiting the general application of the foregoing, the following conduct is
14 a violation of this section:

15 . . .

16 (6) Except as provided in section 15 U.S.C. § 1692b, the placement of telephone
17 calls without meaningful disclosure of the caller's identity.

18 This Court and the Federal District Courts for the Eastern and Central Districts of California
19 have held that it is a violation of 15 U.S.C. § 1692d(6) when a debt collector "fail(s) to disclose [the
20 debt collector's] identity and the nature of [the debt collector's] business in the messages left on [a
21

22 ⁴⁹ See *Hartman v. Meridian Financial Services, Inc.*, 191 F. Supp. 2d 1031, 1046-47 (W.D.
23 Wis. 2002) ("One false or misleading statement in a collection letter renders the entire
24 communication false or misleading and constitutes one violation"); See also *Cacace*, 775 F. Supp.
25 at 505; *Traverso v. Sharinn*, 1989 U.S. Dist. LEXIS 19100, *4 (D. Conn. Sept. 15, 1989); *Picht v.*
26 *Jon R. Hawks, Ltd.*, 236 F.3d 446, 451 (8th Cir. 2001); *Bentley*, 6 F.3d at 62.

27 ⁵⁰ See *Pittman v. J.J. Mac Intyre Co. of Nevada, Inc.*, 969 F. Supp. 609, 613 (D. Nev. 1997).
28 See also *Russell*, 74 F.3d at 36 ("Because the Act imposes strict liability, a consumer need not show
intentional conduct by the debt collector to be entitled to damages.").

⁵¹ *Bentley*, 6 F.3d at 63 (no non-actionable violations of FDCPA); *Taylor*, 103 F.3d at 1234
(failure "to comply with any provision of the FDCPA" leads to liability).

⁵² *Baker*, 677 F.2d at 780.

consumer's] answering machine.”⁵³ Further, these Courts have found that 15 U.S.C. § 1692d(6)'s meaningful disclosure requirement applies “equally to automated message calls and live calls.”⁵⁴

As described above, Defendant failed to meaningfully disclose its name and the identity of its business in each of the thirteen automated messages recorded on Plaintiff's answering machine. Therefore, each of these messages states a violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692d(6). As such, Plaintiff is entitled to partial summary judgment on this issue.

2. DEFENDANT FAILED TO DISCLOSE THAT THE COMMUNICATIONS WERE FROM A DEBT COLLECTOR, IN VIOLATION OF 15 U.S.C. § 1692e(11).

15 U.S.C. § 1692e(11) states:

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

...

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

The failure to disclose clearly in all communications to the consumer that the “communication is from a debt collector” constitutes a violation of the Fair Debt Collection Practices Act.⁵⁵

Defendant has violated 15 U.S.C. § 1692e(11), by not providing the required disclosure in each of the thirteen messages recorded on Plaintiff's answering machine, which are considered

⁵³ *Hosseinzadeh v. M.R.S. Associates, Inc.*, 387 F. Supp. 2d 1104, 1112 (C.D. Cal. 2005), citing, *Joseph v. J.J. Mac Intyre Companies, LLC*, 281 F. Supp. 2d 1156 (N.D. Cal. 2002); *Costa v. Nat'l Action Fin. Servs.*, 2007 U.S. Dist. LEXIS 93230 (E.D. Cal. Dec. 19, 2007); See also, *Foti v. NCO Fin. Sys., Inc.*, 424 F. Supp. 2d 643 (S.D. N.Y. 2006); *Belin v. Litton Loan Servicing*, 2006 U.S. Dist. LEXIS 47953 (M.D. Fla. July 14, 2006); *Leyse v. Corporate Collection Servs*, 2006 U.S. Dist. LEXIS 67719 (S.D.N.Y. Sept. 18, 2006).

⁵⁴ *Hosseinzadeh*, 387 F. Supp. 2d at 1111, citing, *Joseph*, 281 F. Supp. 2d at 1163.

⁵⁵ 15 U.S.C. § 1692e(11); *Emanuel v. American Credit Exchange*, 870 F.2d 805, 808 (2nd Cir. 1989); *Dutton v. Wolpoff & Abramson*, 5 F.3d 649 (3rd Cir. 1993).

“communications” within the meaning of the Fair Debt Collection Practices Act.⁵⁶ Therefore, Plaintiff should be granted partial summary judgment on this issue.

C. DEFENDANT HAS VIOLATED NUMEROUS PROVISIONS OF THE RFDCPA.

In addition to the violations of the federal Fair Debt Collection Practices Act, Plaintiff also alleges several violations of the California Rosenthal Fair Debt Collection Practices Act against Defendant, ENCORE RECEIVABLE MANAGEMENT, INC, a debt collector within the meaning of Cal. Civil Code § 1788.2(c).⁵⁷

1. DEFENDANT HAS VIOLATED CAL. CIVIL CODE § 1788.17.

Cal. Civil Code § 1788.17 provides as follows:

Notwithstanding any other provision of this title, every debt collector collecting or attempting to collect a consumer debt shall comply with the provisions of Sections 1692b to 1692j, inclusive, of, and shall be subject to the remedies in Section 1692k of, Title 15 of the United States Code.

As explained above, ENCORE RECEIVABLE MANAGEMENT, INC., has violated 15 U.S.C. §§ 1692d(6) and 1692e(11). Each of these violations of the FDCPA states a separate violation under Cal. Civil Code § 1788.17, which requires compliance with the FDCPA.⁵⁸ Therefore, Plaintiff should be granted summary judgment on this issue.

2. DEFENDANT HAS VIOLATED CAL. CIVIL CODE § 1788.11(b)

Cal. Civil Code § 1788.11(b) states:

No debt collector shall collect or attempt to collect a consumer debt by means of the following practices:

...

(b) Placing telephone calls without disclosure of the caller’s identity, provided that an employee of a licensed collection agency may identify himself by using his registered alias name as long as he correctly identifies the agency he represents;

Cal. Civil Code § 1788.11(b) requires a debt collector to disclose that a call is from a debt collector

⁵⁶ *Hosseinzadeh*, 387 F. Supp. 2d at 1116.

⁵⁷ Complaint (Doc. 1) ¶ 7; Schwinn Declaration, Exhibit “2” Nos. 3, 4, and 5.

⁵⁸ *Costa*, 2007 U.S. Dist. LEXIS 93230 at *19-20.

1 or on behalf of a creditor.⁵⁹ The requirements of Cal. Civil Code § 1788.11(b) apply equally to
 2 answering machine messages left by debt collectors.⁶⁰ Therefore, Defendant was required to
 3 disclose that the messages recorded on Plaintiff's answering machine were from a debt collector.
 4 By failing to do so in each of the thirteen messages Defendant recorded on Plaintiff's answering
 5 machine, Defendant violated the Rosenthal Fair Debt Collection Practices Act thirteen times.
 6 Therefore, partial summary judgment should be granted for Plaintiff on this issue.

7 **D. THIS COURT SHOULD AWARD PLAINTIFF THE MAXIMUM STATUTORY**
 8 **DAMAGE AMOUNT OF \$1,000 UNDER THE FDCPA**

9 The maximum statutory damage award available under the Federal FDCPA is a modest
 10 \$1,000. Courts have therefore awarded the maximum amount even when the violations found were
 11 less numerous and egregious than those herein. For example, in *Riviera v. M.A.B.*,⁶¹ the court
 12 awarded the maximum \$1,000 because the validation notice appeared on the back of the letter, in
 13 relatively small print, with no reference to it on the front of the letter. Thus, even though the notice
 14 was accurate, the court determined a \$1,000 award was appropriate. Furthermore, in *Tolentino v.*
 15 *Friedman*,⁶² the Seventh Circuit upheld the maximum statutory award of \$1,000 despite finding that
 16 only one provision of the FDCPA had been proven. In that case the debt collector had included a
 17 disclosure required 15 U.S.C. § 1692e(11) in its initial notice, but had failed to include it in a
 18 subsequent notice. The present case involves at least 4 violations of the federal FDCPA. Thus, the
 19 violations herein are more numerous and meaningful than in those cases, and therefore the Court
 20 should award the maximum amount of statutory damages under 15 U.S.C. § 1692k(a)(2)(A), which
 21 is \$1,000.⁶³

22
 23 ⁵⁹ *Joseph*, 281 F. Supp. 2d at 1163.

24 ⁶⁰ *Hosseinzadeh*, 387 F. Supp. 2d at 1111-1112, *citing*, *Joseph*, 281 F. Supp. 2d at 1163.

25 ⁶¹ 682 F. Supp. 174 (W.D.N.Y. 1988).

26 ⁶² 46 F.3d 645 (7th Cir. 1995).

27 ⁶³ *Costa*, 2007 U.S. Dist. LEXIS 93230 at *19.
 28

E. PLAINTIFF SHOULD BE AWARDED \$1,000 UNDER CAL. CIVIL CODE § 1788.30(b).

The Cal. Civil Code § 1788.30 states that any debt collector who fails to comply with any provision is liable to such debtor in an amount equal to his/her actual damages, and in the case of a debt collector who willfully and knowingly violates the RFDCPA, the Court may award a penalty in an amount not less than \$100 nor greater than \$1,000. Cal. Civil Code § 1788.30(b).

In this case, ENCORE RECEIVABLE MANAGEMENT, INC., has violated Cal. Civil Code § 1788.11(b) which is remedied by the statutory penalty provisions of Cal. Civil Code § 1788.30. Thus, Plaintiff should be awarded the full \$1,000 statutory award under Cal. Civil Code § 1788.30.

F. PLAINTIFF SHOULD BE AWARDED \$1,000 UNDER CAL. CIVIL CODE § 1788.17.

In this case, ENCORE RECEIVABLE MANAGEMENT, INC., has violated Cal. Civil Code § 1788.17 which is remedied by the statutory damages provisions of 15 U.S.C. § 1692k(a)(2)(A). Thus, the Plaintiff should be awarded the full \$1,000 statutory award under Cal. Civil Code § 1788.17.

G. BOTH CONGRESS AND THE CALIFORNIA LEGISLATURE HAVE EXPRESSED THEIR INTENT THAT THE REMEDIES FOR VIOLATIONS OF THE FDCPA AND RFDCPA BE CUMULATIVE.

Cal. Civil Code § 1788.32 states “The remedies provided herein are intended to be cumulative and are in addition to any other procedures, rights, or remedies under any other provision of law.” Thus, a violation of the federal statute can lead to damages under the federal FDCPA and a violation of the California statute leads to damages under the RFDCPA. Indeed, the FDCPA expressly states:

[t]his subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the law of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. 15 U.S.C. § 1692n.

Moreover, courts both within and outside the Ninth Circuit, have allowed statutory damages

under both federal and state consumer protection statutes.⁶⁴ Thus, the Court should not be reluctant to assess the maximum possible statutory damages under both federal and state law. As this Court has noted, Cal. Civil Code § 1788 was amended to expand the remedies of the RFDCPA, including an expansion of the statutory damages available under the state law.⁶⁵

Additionally, this Court has concluded that rather than drafting new language to the RFDCPA, the legislature simply incorporated entire sections of the FDCPA by reference.⁶⁶ Indeed, this Court stated “California simply incorporated by reference the text of certain federal provisions into the CFDCPA, rather than copying them verbatim into the California code. Any resulting liability, however, remains a state claim.” *Id.* In a separate case, this Court went on to hold that a violation of 15 U.S.C. § 1692g was also a violation of Cal. Civil Code § 1788.17.⁶⁷ Thus, by incorporating 15 U.S.C. § 1692k by reference (and its statutory damages of \$1,000), the California legislature chose to make the additional \$1,000 available, as a matter of state law, when it enacted Cal. Civil Code § 1788.17.

H. PLAINTIFF HAS A STATUTORY RIGHT TO ATTORNEY’S FEES AND COSTS.

Both the federal FDCPA and California RFDCPA direct the Court to award attorney’s fees to a prevailing consumer.⁶⁸ A number of cases decided under 15 U.S.C. § 1692k have held that an award of attorney fees and costs is required if the plaintiff prevails.⁶⁹ The Court should award the

⁶⁴ *Sakuma v. First National Credit Bureau*, 1989 U.S. Dist. LEXIS 19120 (D. HI. November 15, 1989); *Mann v. Acclaim*, 348 F. Supp. 2d 923 (S.D. Ohio 2004); *Chapman v. ACB Business Services, Inc.*, 1997 U.S. Dist. LEXIS 23743 (S.D. W.V. February 13, 1997).

⁶⁵ *Abels v. JBC Legal Group, P.C.*, 227 F.R.D. 541, 548 (N.D. Cal. 2005) (The mandatory language in the amendment—“ . . . shall be subject to the remedies in Section 1692k” leaves little doubt as to the intent of the legislature to broaden the remedies for RFDCPA.)

⁶⁶ *Alkan v. Citimortgage, Inc.*, 336 F. Supp. 2d 1061, 1065 (N.D. Cal. 2004).

⁶⁷ *Edstrom v. A.S.A.P. Collection Services*, 2005 U.S. Dist. LEXIS 2773, *15 (N.D. Cal. February 22, 2005).

⁶⁸ 15 U.S.C. § 1692k(a)(3) and Cal. Civil Code § 1788.30(c).

⁶⁹ *See, e.g. Zagorski v. Midwest Billing Services, Inc.*, 178 F.3d 116 (7th Cir. 1997) (holding it was an abuse of discretion not to award attorney’s fees following a stipulated judgment in the

1 Plaintiff his reasonable attorney fees and costs incurred in this matter.

2 **VIII. CONCLUSION**

3 For the reasons set forth above, Plaintiff, as a matter of law, is entitled to partial summary
 4 judgment: 1) declaring that Defendant's answering machine messages violated the Fair Debt
 5 Collection Practices Act, 15 U.S.C. §§ 1692d(6) and 1692e(11); 2) declaring that Defendant's
 6 answering machine messages violated the Rosenthal Fair Debt Collection Practices Act, Cal. Civil
 7 Code §§ 1788.11(b), and 1788.17; 3) awarding Plaintiff statutory damages in an amount not
 8 exceeding \$1,000 pursuant to 15 U.S.C. § 1692k(a)(2)(A); 4) awarding Plaintiff statutory penalty
 9 in an amount not less than \$100 and not exceeding \$1,000 pursuant Cal. Civil Code § 1788.30(b);
 10 5) awarding Plaintiff statutory damages in an amount not exceeding \$1,000 pursuant to 15 U.S.C.
 11 § 1692k(a)(2)(A) as incorporated by Cal. Civil Code § 1788.17; 6) awarding Plaintiff the costs of
 12 this action and reasonable attorneys fees pursuant to 15 U.S.C. § 1692k(a)(3) and Cal. Civil Code
 13 §§ 1788.30(c) and 1788.17; and 7) awarding Plaintiff such other and further relief as may be just
 14 and proper.

15 CONSUMER LAW CENTER, INC.

16 By: /s/ Fred W. Schwinn
 17 Fred W. Schwinn, Esq.
 18 Attorney for Plaintiff
 19 SAMUEL KWESI DADJO
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25 amount of \$100; and directing the court to award fees sufficient to compensate the attorney for the
 26 time spent on the case in order to encourage enforcement of the FDCPA); *Pipiles v. Credit Bureau,*
 27 Inc., 886 F.2d 22 (2d Cir. 1989) (directing trial court to award fees on remand despite the lack of
 28 actual or statutory damages because Plaintiff had demonstrated that Defendant violated the FDCPA);
Perez v. Perkiss, 742 F. Supp. 883 (D. Del. 1990) (awarding Plaintiffs' legal services attorneys
 \$10,110 after a half-day jury trial in which Plaintiff was awarded \$1,200 in damages).